SUPREME COURT, U. S.
Office-Supreme Court, U.S.
FILED
SEP 12 1958
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 12

STATE OF MINNESOTA,

Respondent,

vs.

NORTHWESTERN STATES PORTLAND CEMENT COMPANY,

Appellant.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF FOR THE RESPONDENT

MILES LORD
Attorney General
PERRY VOLDNESS
Assistant Attorney General
ARTHUR C. ROEMER
Special Assistant Attorney General
102 State Capitol
St. Paul 1, Minnesota
Attorneys for Respondent

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the State Supreme Court in this action is reported in 250 Minn. 32, 84 N. W. 2d 373. For a copy of that opinion, the dissenting opinions and judgment, see R. pp. 221, et seq. For copies of the trial court's findings of fact, conclusions of law, and order for judgment dated August 31, 1955, and memorandum attached thereto; order for

amended findings of fact, conclusions of law and order for judgment, dated October 11, 1955; and judgment dated November 4, 1955, see R. pp. 189, et seq.

JURISDICTION

The judgment of the Supreme Court of Minnesota was entered on September 10, 1957 (R. 297, f. 3; R. 298, f. 1) following the decision of that court sustaining the validity of the tax in question. A timely petition for re-argument was filed by appellant on July 25, 1957 (R. 276, f. 280) and was denied by the Minnesota Supreme Court on August 28, 1957 (R. 297, f. 297). Notice of appeal was filed by appellant in the Supreme Court of Minnesota on September 12, 1957 (R. 298, f. 299).

Jurisdiction of the court is invoked under 28 U. S. Code, 1257 (2) and 2101 (c) because it is claimed that the tax sustained by the decision of the Minnesota Supreme Court violates the due process clause of the U. S. Const. Amend. XIV, s. 1 and commerce clause, U. S. Const. Art. I, s. 8, cl. 3.

Probable jurisdiction was noted January 6, 1958 (R. 304, f. 309).

QUESTIONS PRESENTED

I

Whether a net income tax applying equally to all taxpayers, resident or non-resident, whether engaged in either interstate or intrastate commerce, confined to that portion of the taxpayer's net income earned from and fairly apportioned to business activities localized within the taxing state,

is in conflict with and thus invalid and void under the due process clause of U. S. Const. Amend. XIV, s. 1.

II

Whether a net income tax applying equally to all taxpayers, resident or non-resident, whether engaged in either interstate or intrastate commerce, confined to that portion of the taxpayer's net income earned and fairly apportioned to business activities localized within the taxing state in the case of a foreign corporation whose business in the taxing state consists exclusively of interstate commerce is in conflict with and thus invalid and void under the commerce clause of the U. S. Const. Art. I, s. 8, cl. 3.

STATUTE INVOLVED

The tax in question was levied under Minnesota Statutes, s. 290.03. The statutory history of this section is set forth and attached hereto as Appendix "A". The statute reads as follows:

"290.03. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation pur-

poses by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for for than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

STATEMENT OF CASE

During the years here involved, appellant was a corporation organized and existing under and by virtue of the laws of the State of Iowa, with principal offices and place of business in Mason City, Iowa (R. 189, f. 1).

It was engaged in the manufacture and sale of cement, its home office and manufacturing plant being located in Mason City, Iowa (R. 191, f. 1). It maintained a sales office in Minneapolis, Minnesota, which was operated under a lease paid for from the appellant's home office in Mason City, Iowa (R. 191, f. 1). Appellant owned no real estate in Minnesota but did own personal property in this state consisting of office furniture and fixtures, supplies, good will advertising and other material located in its Minneapolis sales office (R. 191, ff. 1-2). The office consisted of three rooms and the personal property included three desks, two filing cabinets, a typewriter and some chairs (R. 191, f. 2). In addition, the automobiles used by the appellant's salesmen were owned by the company and were located in the State of Minnesota (R. 191, f. 2).

Appellant had, at most, no more than six employees residing in the State of Minnesota (R. 191, f. 3). Two salesmen and a secretary operated out of its Minneapolis sales office (R. 191, f. 3). Other employees of the appellant in this state operated directly out of their homes (R. 191, f. 3). All were residents of Minnesota (R. 191, f. 3). These employees were hired by supervisory personnel from the appellant's home office in Mason City, Iowa (R. 191, f. 3).

The personal property of appellant located in the State of Minnesota during the years here involved was paid for out of appellant's home office in Mason City, Iowa (R. 192, f. 1). Most of the supplies used in Minnesota by the appellant were obtained from the Mason City office (R. 192, f. 1). Appellant's employees in the Minneapolis office, however, had authority to purchase supplies, such as stamps, etc. (R. 192, f. 2). Appellant did not maintain a bank account or a petty cash fund in this state (R. 192, f. 2). Salaries of Minnesota employees were fixed by the Mason City office and both salaries and entertainment expense were paid directly to the salesmen from appellant's home office in Iowa (R. 192, ff. 2-3). Appellant's employees were on a straight salary and vacation policies were established by the home office (R. 192, f. 3). Territories of appellant's salesmen in Minnesota were allocated by the home office and Minnesota employees did not have authority to re-allocate territories among themselves (R. 192, f. 3).

Appellant maintained two telephone lines in its Minneapolis office and was listed in the alphabetical and classified section of the Minneapolis telephone directory (R. 192, f. 3; R. 193, f. 1), and in the Saint Paul telephone directory since prior to 1946 (R. 178, f. 1). Appellant was listed in the classified section under the subheading: "Cement, Whole-

salers and Manufacturers" (R. 176, f. 3; R. 179, f. 1). The telephone company determines the subheading or classification under which a subscriber is listed by consulting the company obtaining the service (R. 177, ff. 1-2).

Appellant was also listed in the Minneapolis city directory (R. 193, f. 1).

Appellant's employee, Wilkins, held himself out as appellant's district manager and the company had knowledge of this fact (R. 215, f. 1). Wilkins was in charge of the Minneapolis sales office (R. 215, f. 2). He was listed in the telephone directory and in the city directory as district manager and applications for automobile license plates were signed by him as appellant's district manager (R. 215, f. 2). On various occasions, appellant's employees in Minnesota purchased automobiles and Wilkins purchased two automobiles (R. 215, f. 2). Such purchases were on bids approved by the home office (R. 215, f. 2).

The Minneapolis sales office of the appellant was used to some extent as a central office for Minnesota salesmen and customers (R. 215, f. 3), as a clearing house for orders that customers telephoned or sent in (R. 215, f. 3), as a place where complaints might be made or inquiries directed (R. 215, f. 3), and was also available to the appellant's other Minnesota salesmen when they were in Minneapolis, that is, a place where they might use the telephone or do their work (R. 215, f. 3; R. 216, f. 1). Advertising supplies, such as pencils, pads and blotters were available in this office for customers (R. 216, f. 1).

Orders received by appellant's salesmen in Minnesota were transmitted daily to appellant's home office in Iowa where they were approved (R. 216, f. 1). Orders received by appellant from its Minnesota salesmen were acknowledged by it

from the home office in Iowa directly to the customers and copies were sent to the salesmen, or if the orders came from the Minneapolis district, copies were sent directly to the Minneapolis sales office, even though such orders came in by telephone or by mail (R. 216, f. 2). Minnesota salesmen did not have authority to accept a customer's order or to approve a customer's credit (R. 216, f. 2). Credit extensions and collections were handled by appellant's home office in Mason City (R. 216, ff. 2-3).

Claims for loss of damage were generally handled through the home office (R. 216, f. 3). However, it was not uncommon for customers to present their claims to the Minnesota salesmen who would write the company, informing it of the trouble and asking the company what it wished to do about it (R. 216, f. 3).

Appellant was engaged in selling and delivering cement to Minnesota customers for at least thirty years prior to the commencement of the action here involved (R. 195, f. 1). Forty-eight percent of appellant's entire sales were made to customers within Minnesota (R. 195, f. 1). The price of appellant's product was the delivered price to the customer, although the appellant endeavored to keep the base price and freight rates separate (R. 195, f. 1). In all cases the purchaser paid the price of the product delivered to his place of business and it was impossible to purchase cement from the appellant except at a delivered price. A purchaser could not pick up appellant's products at appellant's plant or office in Iowa (R. 195, f. 2). Appellant's Minnesota salesmen were able to quote customers a delivered price determined by freight rate plus package plus cement (R. 73, f. 3) and the salesmen were authorized by the appellant to tell the

customers the delivered price (R. 74, f. 1). Appellant's merchandise was invoiced and shipped by rail from appellant's home office in Mason City directly to the purchaser (R. 195, f. 2). Appellant's purchasers were located in Iowa, Minnesota, Nebraska, North Dakota, South Dakota and Wisconsin (R. 195, f. 3). Appellant did not maintain any warehouse for storing its merchandise in the State of Minnesota and no merchandise was stored or kept by it in this state (R. 195, f. 3). Price quotations were prepared and sent out from the home office and changes in price were prepared by that office (R. 195, f. 3). Appellant enjoyed a definite competitive advantage over Minnesota cement companies by reason of the favorable freight rates to the appellant as it was in closer proximity to Southern Minnesota customers than such customers were to Minnesota cement producers (R. 195, f. 3; R. 196, f. 1).

Appellant's activities in Minnesota consisted of a regular and systematic course of solicitation of orders for the purchase of merchandise, such orders being subject to acceptance, filling and delivery by the appellant from its home office in Mason City, Iowa (R. 196, ff. 1-2). When sales had been made and orders taken by the Minnesota salesmen and forwarded to appellant's home office the duties of the Minnesota salesmen were not at an end (R. 111, f. 1). The Minneapolis sales office and all of its employees in Minnesota had duties in addition to soliciting orders for merchandise. These duties consisted of a regular and systematic method of contacting potential customers and users of cement products, the promotion and building of good will, the entertainment of customers and the doing of all things necessary to main-

tain and enlarge the volume of business done by the appellant in the State of Minnesota (R. 196, ff. 2-3).

Large quantities of appellant's cement products were used for the building of state and local highways and such orders sometimes called for forty to fifty thousand barrels of cement and in addition the employees of appellant were required to contact builders, contractors and architects and any other potential user of appellant's products (R. 196, f. 3).

In promoting and building good will and in contacting potential customers and users of cement products, the appellant would quote prices to contractors to whom they would not sell directly (R. 80, ff. 1-2). This quotation would be the price for which the contractor could buy the cement from the yard or dealer (R. 80, f. 2). Appellant's salesmen in effect contacted contractors in order to get the order for the dealer so that appellant could in turn sell the dealer the cement (R. 91, f. 2). This activity was common and widespread enough to require the development of a special form for quoting price to contractors (Exh. 17; R. 79, ff. 2-3; R. 82, f. 1).

Appellant's employees in Minnesota, with the exception of the secretary in the Minneapolis office, were all salesmen (R. 197, f. 1). It was their job to sell appellant's products and build good will (R. 197, f. 1). Appellant would sell only to eligible dealers who were lumber and building material supply dealers, contractors and ready mix companies (R. 197, f. 1). Appellant maintained a list of all eligible Minnesota customers in its Iowa office and no matter how an order came into the home office, the company would not sell unless the order had come in from an eligible purchaser (R. 197, ff. 1-2). The appellant's salesmen were provided

ith lists of all eligible purchasers in their territory and ere required, as a part of their job, to call on every potential ıstomer as often as possible (R. 197, f. 2). Salesmen in ıtstate territories called on a customer on an average of very three weeks and in the Twin City district, customers ere called on much more frequently (R. 197, f. 2).

Because of the substantial volume of business carried on in Minnesota, there was a steady and continuous flow of appellant's products into the State of Minnesota at all times R. 197, f. 2). Appellant's activities in Minnesota are regur, systematic and well organized for the selling of appelnt's products (R. 197, f. 3; R. 198, f. 1).

Appellant's predecessor corporation resorted to the courts f the State of Minnesota to enforce its contracts on at least ne occasion (R. 198, f. 1).

The appellant filed no income tax returns with the State f Minnesota for any of the taxable years here involved. The tate of Minnesota, acting through its Commissioner of Taxaon, prepared, on the basis of information available to the ommissioner of Taxation, income tax returns for the appellant for its fiscal years 1933 through 1948 and assessed gainst the appellant the income taxes shown to be due by aid returns (R. 189, f. 3). In the preparation of such returns, ne Commissioner of Taxation used the three-factor formula escribed in Minnesota Statutes, s. 290.19, in determining ne portion of the appellant's overall net income for each f its fiscal years here involved which was to be allocated o Minnesota and subjected to the income tax imposed by his state (R. 190, f.1). The three factors utilized in this ormula are: (1) the ratio of the taxpayer's sales assignable o Minnesota during the year to its total sales for the year

wherever made; (2) the ratio of the taxpayer's total tangible property in Minnesota for the year to its total tangible property used in the business that year wherever situated; and (3) the ratio of the taxpayer's total payroll in Minnesota for the year to its total payroll for its entire business that year (R. 190, ff. 1-2). The appellant did not take issue with the fairness of the formula or the propriety of amounts listed as Minnesota sales, Minnesota property or Minnesota payroll.

The income taxes, penalties and interest assessed against the appellant for its fiscal years ending in 1933 through 1948 are as follows (R. 190, ff. 2-3):

Fiscal Year Ended November 30	Taxes	Penalty	Interest to 12/1/53
1933	$ 806.48	$ 40.32	$ 512.70
1934	2,530.92	126.55	1,997.18
1935	1,734.29	86.71	1,296.05
1936	4,240.29	212.01	2,990.27
1937	4,875.78	243.79	3,234.24
1938	4,510.41	225.52	3,241.12
1939	6,215.48	310.77	3,600.17
1940	4,992.95	249.65	2,682.68
1941	7,543.57	377.18	3,734.07
1942	3,277.92	163.90	1,634.25
1943	10.14	.51	4.31
1944	2,496.32	124.80	920.89
1945	3,462.01	173.10	1,132.90
1946	8,035.85	401.79	2,292.32
1947	4,114.51	205.73	1,000.81
1948	8,370.53	418.53	1,684.55

SUMMARY OF ARGUMENT

I. Analysis of the Tax at Issue in This Proceeding.

The Minnesota law here at issue, Minnesota Statutes, section 290.03, imposes a tax upon the taxable net income of all domestic and foreign corporations, except those taxable under Minnesota Statutes, section 290.02, which own property within Minnesota, or whose business consists exclusively of foreign commerce, interstate commerce, or both.

The Minnesota Supreme Court has held that this tax is a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against interstate commerce; it is not, by dictionary definition, legislative intent, or by operative effect, an excise, franchise, or privilege tax. It is non-discriminatory, applying equally to all taxpayers, resident or non-resident, whether engaged in interstate or intrastate commerce, and is confined to that portion of a taxpayer's income earned from business activities which are fairly apportioned to, and localized within, the State of Minnesota.

The interpretation of this statute by the Minnesota Supreme Court is a part of the statute for purposes of determining whether this taxing statute as applied violates the due process clause or the commerce clause of the United States Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 570, 69 S. Ct. 1291, 1296 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 84, 85, 68 S. Ct. 1475, 1477 (1948).

II. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Its Activities Conducted Within the Taxing State Is Not in Conflict With and Does Not Violate the Due Process Clause of the U. S. Const., Amend. XIV, s. 1.

In considering whether a particular tax is to stand or fall under the due process clause of the U. S. Constitution, Amend XIV, the question for determination is whether the tax as imposed taxes values beyond the jurisdiction of the state imposing the tax. The due process clause is satisfied if the tax in practical operation had relation to opportunities, benefits or protection conferred or afforded by the taxing state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432, 434 (1949).

In the instant case, the taxpayer is present through its extensive localized activities (as summarized in the statement of case) and enjoys in return for any taxes exacted the opportunities, protection and benefits of a modern community serviced by a state government which maintains courts, police, roads and other services of distinct advantage to the building and maintenance of the appellant's tremendous sales volume (48 percent of its total sales) through business outlets within the state.

The fairness of the three-factor formula in apportioning the tax to the commerce carried on within the State of Minnesota is not in issue in this case.

Apportionment formula similar to the three-factor apportionment formula used by the State of Minnesota have on many occasions been upheld against due process attacks.

John Deere Plow Co. v. Franchise Tax Board, 343 U. S. 939, 72 S. Ct. 1036 (1952); *Commonwealth v. Ford Motor Co.*, 324 U. S. 827, 65 S. Ct. 857 (1945); *Butler Bros. v. McColgan*, 315 U. S. 501, 62 S. Ct. 701 (1942).

The very essence of the due process objection is that a tax will reach to income and values beyond the territorial jurisdiction of the state. When the total net income of a taxpayer is apportioned as in the instant case so as to reflect only that portion of the net income properly and fairly assignable to the taxing state, the due process objection has been overcome.

To sustain a tax under the due process clause there must, of course, be some minimal connection between the subject of the tax and the state.

The appellant's contention that there are insufficient connections with the state to be subject to its taxing power is foreclosed by the decision of this court in the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945) and *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946).

The income-producing activities of the appellant in the State of Minnesota are outlined in the findings of fact and the statement of the case. The factual connections between the appellant and the state were far greater in the instant case than in the International Shoe Co. case and were comparable to those in the West Publishing Co. case.

The tax in question is related to the benefits and protection conferred by the State of Minnesota and is imposed only upon that portion of the foreign corporation's income which is fairly attributable to the corporate activity within Minnesota. The extensive activities of appellant are more than

sufficient to meet the requirements of the "minimal connections" required by the due process clause.

III. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Those Activities Localized Within the Taxing State Which Give Rise to That Portion of the Foreign Corporation's Net Income, Which Neither Burdens Nor Discriminates Against Interstate Commerce, Is Not Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Is Not a Condition Precedent to the Foreign Corporation's Engaging in Interstate Commerce Within the Taxing State, Does Not Contravene the Commerce Clause, U. S. Const. Art. I, s. 8.

The decision of the Minnesota Supreme Court is in accord with and is sustained by the decisions of this court.

This court has consistently held that interstate commerce must pay its own way. *Postal Telegraph Cable Co. v. City of Richmond*, 249 U. S. 252, 259, 39 S. Ct. 265, 266 (1919); *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 254, 58 S. Ct. 546, 548 (1938); *Michigan-Wisconsin Pipe Line Co. v. Calvert*, 347 U. S. 157, 165, 74 S. Ct. 396, 400 (1954).

However, this court has also held that in order to make interstate commerce pay its own way a state tax must meet certain constitutional standards.

The decisions demonstrate that there are various grounds upon which a tax may conflict with the commerce clause. Thus, any tax which is directly imposed upon the privilege

of engaging in interstate commerce will not stand before a constitutional attack upon commerce clause grounds. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295.

The Minnesota net income tax at issue in this proceeding is not a franchise or excise on commerce nor is it imposed on the privilege or franchise of engaging in interstate commerce. It is levied after the interstate commerce transactions within the state have been completed and after all expenses are paid and losses adjusted. Thus, the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow (Minnesota Supreme Court opinion, R. 235, f. 236).

Even though a tax directly imposed on interstate commerce is forbidden, it is well established that a non-discriminatory tax may be levied on net income wholly derived from operations in interstate commerce. *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1947); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct. 45 (1920); *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918).

It is a well recognized and long-standing principle of law that a tax does not discriminate against interstate commerce if other related taxes impose equal burdens on intrastate commerce. *Capital Greyhound Lines v. Brice*, 339 U.S. 542, 70 S. Ct. 806 (1950); *Henneford v. Silas Mason Co.*, 300 U.S. 577, 582-584, 57 S. Ct. 524, 527 (1937).

The tax at issue does not discriminate against interstate commerce, since all corporations not taxable under Minnesota Statutes, Section 290.03 are subject to tax of equal rate under Minnesota Statutes, Section 290.02.

In fact, if the appellant was not subject to tax in Minnesota it would enjoy an advantageous competitive position with domestic corporations who are subject to a tax of equal rate.

The last remaining grounds for objection raised by the appellant is that the tax imposes a cumulative or multiple tax burden. However, the commerce clause requires only a fair apportionment of the net income to the activities conducted within the taxing state. *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546 (1938). The tax in question in the instant case could not impose a multiple burden upon interstate commerce since it is imposed only upon net income and is limited and confined to that portion of the net income fairly attributable to the activities conducted within the State of Minnesota. This computation is made by the well-recognized three-factor formula which has not been challenged by the appellant.

This same constitutional requirement is imposed upon each taxing state and prevents the doubling up or multiplying of the burden in such a way as to result in the total taxation of more than 100% of the net income of the corporation.

The rule that personal property used in interstate commerce may be taxed in two or more states on an apportionment basis precludes taxation by the domiciliary state on other than an apportionment basis. *Standard Oil Co. v. Peck*, 342 U.S. 382, 72 S. Ct. 309 (1952); *Braniff Airways v. Nebraska Board*, 347 U. S. 590, 74 S. Ct. 757 (1954). The same requirement of apportionment of the tax base should apply with respect to net income taxes and will prevent any mul-

tiple or cumulative taxation of the foreign corporation's net income.

Thus, Minnesota's net income tax, the subject and measure of which is net income, and which is limited and confined to that portion of the net income fairly apportioned and attributed to the corporate activity within the taxing state does not impose a direct burden upon interstate commerce in form nor substance, it does not discriminate against interstate commerce nor does it impose a multiple or cumulative burden. It, therefore, follows that the tax here in question does not violate the commerce clause, U. S. Const. Art. I, s. 8, cl. 3.

ARGUMENT

I. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Its Activities Conducted Within the Taxing State Is Not in Conflict With, and Does Not Violate, the Due Process Clause of the U. S. Const. Amend. XIV, s. 1.

Minnesota Statutes, s. 290.03, imposes a tax upon the taxable net income of all domestic and foreign corporations, except those taxable under Minnesota Statutes, s. 290.02, which own property within Minnesota, or whose business consists exclusively of foreign commerce, interstate commerce, or both.

The Minnesota Supreme Court held that this tax is a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against interstate commerce (R. 231, f. 232):

which is not, by dictionary definition, legislative intent, or operative effect, an excise, franchise, or a privilege tax (R. 231, f. 232). The tax was held to be non-discriminatory, applying equally to all taxpayers, resident or non-resident, whether engaged in interstate or intrastate commerce, and confined to that portion of the taxpayer's income which is fairly apportioned to the State of Minnesota as arising out of business activities which are localized within the State of Minnesota (R. 231, f. 232).

The interpretation of this statute by the Minnesota Supreme Court is a part of the statute as applied, for purposes of determining whether the taxing statute, violates the United States Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 568, 570, 69 S. Ct. 1291, 1295, 1296 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 84, 85, 68 S. Ct. 1475, 1477 (1948).

In considering whether a particular tax is to stand or fall under the due process clause of the U. S. Const. Amend. XIV, s. 1, the question for determination is whether the tax as imposed taxes values beyond the jurisdiction of the state imposing the tax. As stated in *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 174, 69 S. Ct. 432, 434 (1949):

> "So far as due process is concerned, the only question is whether the tax in practical operation has relation to opportunities, benefits or protection conferred or afforded by the taxing State."

The court below pointed out the benefits and protection conferred by Minnesota, stating:

> "TAXPAYER RECEIVES EXTENSIVE BENEFITS OF STATE GOVERNMENTAL SERVICES AND ENJOYS THE PROTECTION OF THE STATE COURTS.

"Clearly, this is not a case where a state reaches beyond its borders and fastens its tax talons upon an event having no factual connection with transactions within its borders whereby it is unable to confer anything in return for the exaction. Here instead the taxpayer is present through its extensive localized activities and enjoys, in return for any taxes exacted, the opportunities, protection, and benefits of a modern community serviced by a state government which maintains courts, police, roads, and other services of distinct advantage to the building and maintenance of the taxpayer's tremendous sales volume (48 percent of its total sales volume) through business outlets within the state. It is not amiss to observe that the taxpayer, or its immediate predecessor under a prior incorporation, has already had occasion to seek the benefit and protection of our courts." (R. 230, f. 231; R. 231, f. 231)

The requirement that the tax in practical operation be related to the opportunities, benefits, and protection conferred or afforded by the taxing state is satisfied if the tax is fairly apportioned to the commerce carried on within the state. *Ott v. Mississippi Valley Barge Line Co.*, 336 U. S. 169, 69 S. Ct. 432 (1949).

The fairness of the three-factor formula provided by Minnesota Statutes, s. 290.19, in apportioning the tax to the commerce carried on within the civilized community provided by the State of Minnesota is not in issue in this case.

The use of the three-factor formula in fairly apportioning income of a unitary business has been sustained by this court on many occasions. *John Deere Plow Co. v. Franchise Tax Board*, 343 U. S. 939, 72 S. Ct. 1036 (1952); *Commonwealth v. Ford Motor Co.*, 324 U. S. 827, 65 S. Ct. 857 (1945); *Butler Bros. v. McColgan*, 315 U. S. 501, 62 S. Ct. 701 (1942).

The very essence of the due process objection is that a tax

will reach to income and values beyond the territorial jurisdiction of the state. When the total net income of a taxpayer is approtioned so as to reflect only that portion of the net income properly and fairly assignable to the taxing state the essence of the tax is its fairness and the due process objection has been overcome.

To sustain a tax under the due process clause there must, of course, be some minimal connections between the subject of the tax and the state.

The appellant's contention that it has insufficient connections with the state to subject it to the taxing power is foreclosed by the decision of this court in the case of *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945).

There the non-domiciliary foreign corporation was engaged solely in interstate commerce. It had no office in the State of Washington and made no contracts there either for sale or purchase of merchandise. It maintained no stock of merchandise and delivered no goods in intrastate commerce. It employed eleven to thirteen salesmen who resided in Washington and whose principal activities were confined to that state. The salesmen's authority was limited to the exhibition of samples and the solicitation of orders from prospective buyers at prices and on terms fixed by the International Shoe Company. The orders were transmitted by the salesmen to offices outside the state for acceptance or rejection. If accepted, the merchandise was shipped from outside the state directly to the purchaser within the State of Washington. This court pointed out in the International Shoe Company decision that unlike an individual the corporate presence without as well as within the state of its origin could be manifested only by activities carried on in its behalf by those

who are authorized to act for it and that in this respect "presence" merely symbolized those activities of the corporation's agent within the state which the courts would deem to be sufficient to satisfy the demands of due process. This court then held that the appellant corporation had subjected itself to the State of Washington's jurisdiction for the purpose of suit and for the purpose of tax. This court pointed out that its activities (less substantial in scope and effect than those carried on in the instant case) established its "presence" and subjected it alike to taxation by the state and to suit to recover the tax.

In *West Publishing Co. v. McColgan,* 328 U. S. 823, 66 S. Ct. 1378 (1946), on facts substantially similar to the facts in the instant case, this court, citing International Shoe Company as authority, affirmed per curiam the decision of the California Supreme Court that the imposition of California's income tax on the apportioned net income of a corporation engaged solely in interstate commerce did not violate the due process clause. Thus, it is apparent that the appellant's continuous and systematic course of solicitation of business in the State of Minnesota for a period of more than thirty years, together with the activities of the maintaining of resident representatives to solicit orders, entertain customers, furnish customers with information, receive and forward customers' complaints, and contact prospective users of their product to urge the purchase of its product from local outlets, maintaining a local service office and permitting its office manager and representative to hold himself out as its district manager and engaging in many other additional local activities is more than sufficient to sustain the tax as against the due process attack.

The localized activities in the instant case were as extensive as the activities of West Publishing Company and International Shoe Company.

More than fifty years ago, in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155, 38 S. Ct. 295, 297 (1918), this court ruled on an analogous situation with respect to Northwestern Consolidated Milling Co., one of seven corporations which were taxed under a Massachusetts excise tax imposed on each of the corporations on the ground that each was doing a local business in the state. In overruling objections to the tax based on the commerce clause of the Constitution and the due process and equal protection clauses of the Fourteenth Amendment with respect to the Northwestern Consolidated Milling Co., this court stated:

> "This company was incorporated under the laws of Minnesota, operates flour mills there, and sells the flour to wholesale dealers throughout the country. It has an office in Massachusetts where it employs several salesmen for the purpose of inducing local tradesmen to carry and deal in its flour. These salesmen solicit and take orders from retail dealers and turn the same over to the nearest wholesale dealer, who fills the order and is paid by the retailer. Thus the salesman, although not in the employ of the wholesaler, is selling flour for him. Of course this is a domestic business—inducing one local merchant to buy a particular class of goods from another—and may be taxed by the state, regardless of the motive with which it is conducted." (246 U. S. 147, 155)

The facts in the case at bar show that appellant's resident representatives contacted prospective users of its product inducing them to buy its product through and from the appellant's established local outlets or dealers (R. 196, ff. 2-3).

The court below emphasized this facet of the appellant's Minnesota activities (R. 230, ff. 2-3). Here the appellant has conducted within the State of Minnesota, income-producing activities and transactions which, though related to interstate commerce, have become separated from the direct flow of that commerce and are so localized within the state as to amount to a local business, enjoying all of the benefits and advantages of a local business and should pay its fair share of the costs of government.

Appellant, in its brief, p. 15, n. 1, cites *International Shoe Co. v. State of Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), and alleges that the tax sought to be imposed in the instant case has no relationship to the presence in the Minnesota of appellant's solicitors. This position is without merit. Certainly appellant did not carry on its activities within the State of Minnesota for nothing. It was these very extensive activities which gave rise to that portion of the net income which has been fairly apportioned to Minnesota and subjected to the tax in question.

Appellant continually refers to mere solicitation contending that this does not provide "local incidents of operation" which would enable the state to tax a foreign corporation which in all other respects stays at home. In the instant case, it is apparent from the facts that the appellant engaged in something more than "mere" solicitation.

Appellant employs resident sales representatives in Minnesota who regularly and systematically solicit orders from eligible purchasers (R. 227, f. 228; R. 230, f. 231). As was stated by this court in Nippert v. City of Richmond, 327 U. S. 416, 426, 66 S. Ct. 586, 591 (1946):

> "In view of the ruling in International Shoe Company v. Washington, supra, we put aside any suggestion that

'solicitation,' when conducted regularly and continuously within the state, so as to constitute a course of business, may not be 'doing business' just as is the making of delivery, at any rate for the purpose of focusing a tax which in other respects would be sustainable. * * *."

Appellant has carried on a course of conduct which is more than regular and continuous solicitation. Appellant rents and maintains an office in the taxing state which is used to some extent as a central office and as a clearing house for orders and complaints. A full time secretary is employed in this office, telephone lines are maintained, it is listed in the telephone and city directories as the office of appellant. One of the district representatives is in charge of this office and with the appellant's knowledge holds himself out as district manager (R. 227, f. 227). Appellant has within the state office equipment, good will advertising and other material and also owns the automobiles kept within the state driven by its Minnesota salesmen (R. 227, f. 228).

In addition, the appellant's salesmen who are residents within the taxing state regularly and systematically contact users of cement products to induce them to buy from taxpayer's established local outlets and dealers. As pointed out earlier, an activity as broad as this was held sufficient to sustain an excise tax imposed upon a foreign corporation for the privilege of doing a local business with respect to the tax upon Northwestern Milling Company, in *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 155, 38 S. Ct. 295, 297 (1918), in addition, the appellant's representatives promote good will and furnish advertising material to customers, entertain customers, and receive and forward complaints on occasion (R. 228, f. 228). These activites result

in a flow of taxpayer's product into Minnesota which constitutes about 48 percent of its sales volume (R. 228, f. 228). Certainly activities as broad and comprehensive as appellant's activities within the State of Minnesota resulting in 48 percent of its sales volume cannot be dismissed as "mere solicitation".

In *Miller Bros. Co. v. State of Maryland*, 347 U. S. 340, 74 S. Ct. 535 (1954), relied upon by appellant with respect to its due process objection, it must be pointed out that in that case the taxpayer had no solicitors or agents within the taxing state, made no sales within the taxing state, did not accept telephone or mail orders, and its only contact with the taxing state was that the taxpayer's newspaper, radio and advertising reached the taxing state, some sales circulars were mailed to customers within the taxing state and some deliveries were made to Maryland locations. The tax was stricken as repugnant to the Fourteenth Amendment and this court stated:

> "But the course of decisions does reflect at least consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (347 U. S. 344-345)

The Miller Bros. case holds that the activities were less than the minimum required by the due process clause. Certainly the minimal activities there cannot be compared with the extensive activities of appellant within the State of Minnesota.

Appellant places some reliance on the argument that title to the products sold passed at the moment of delivery to the common carrier in Iowa, citing McLeod v. J. E. Dilworth Co., 322 U. S. 327, 64 S. Ct. 1023 (1944). It is to be pointed

out that in that decision the tax was in violation of the commerce clause and was stricken on that ground alone.

As ably stated by Mr. Justice Rutledge in his dissent in *McLeod v. J. E. Dilworth Co.*, 322 U. S. 349, 351, 64 S. Ct. 1030, 1032 (1944):

> "Surely the state's power to tax is not to turn on the technical legal effect, relevant for other purposes but not for this, that 'title passes' on delivery to the carriers in Memphis and may or may not so pass, so far as the record shows, when the Minnesota shipment is made to Iowa. In the absence of other and more substantial difference, that irrelevant technical consideration should not control. However it may be determined for locating the incidence of loss in transit or other questions arising among buyer, seller and carrier, for purposes of taxation that factor alone is a will-o'the wisp, insufficient to crux a due process connection from selling to consuming state * * *."

It is to be noted that with respect to rail shipment of appellant's merchandise the Minnesota purchaser has no choice for the record shows it was impossible for the Minnesota purchaser to buy cement at other than the delivered price of cost of cement, plus package plus freight and it was impossible for the Minnesota purchaser to pick up the product at appellant's plant or office in Iowa (R. 62, f. 3; R. 115, ff. 1-2; R. 119, f. 2; R. 133, f. 1; R. 154, f. 3; R. 155, ff. 1-2). Certainly these facts indicate that the delivery to the carrier in Iowa is merely a technical consideration not relevant for the purpose of determining the power of a state to impose a general net income tax such as we have here.

Appellant asks:

> "What has Minnesota given this taxpayer for which they ask a return?"

and places great stress on the fact that the judgment demanded is over $100,000 (Appellant's Brief, pp. 22, 23).

It is pertinent to point out that the record shows that the tax sought to be collected here covered sixteen years, 1933 to 1948, inclusive, and amounted in total tax to $67,217.45, the remaining amount in issue, being penalties and interest. It should be pointed out also that in the year 1946, which is the year of greatest tax, the tax amounted to $8,035.85; that in 1943, the tax amounted to $10.14; that in the years 1933 through 1948 the tax amounted to less than $5,000 in each year with the exception of 1939, 1941, 1946 and 1948.

In addition, appellant contends that no benefits were conferred or afforded by the State of Minnesota to or upon the appellant. Certainly it is apparent that the State of Minnesota provides a market in which the appellant carries on its activities and that appellant benefits from the market provided and from all of the protection afforded by the State of Minnesota. Like the activities in *Field Enterprises v. Washington*, 47 Wash. 2d 852, 289 P. 2d 1010, aff'd per curiam 352 U. S. 806, 77 S. Ct. 55 (1956); *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, aff'd per curiam 328 U. S. 823, 66 S. Ct. 1378 (1946); and *International Shoe Co. v. Washington*, 326 U. S. 310, 66 S. Ct. 154 (1945), the activities carried on in behalf of appellant were neither irregular nor casual. They were systematic and continuous throughout the years in question. They resulted in a large volume of interstate business, in the course of which appellant received the benefits and protection of the laws of the state, including the right to resort to the courts for the enforcement of its rights.

The tax in question is fairly apportioned to appellant's activities within the state which are so localized in nature as

to compete with local business and enjoy all the opportunities, benefits and protection afforded by the State of Minnesota. Appellant is *present* within the State of Minnesota and carries on its activities under the protection of the laws of Minnesota. It follows that appellant should pay its own way.

II. A Non-discriminatory Net Income Tax Limited and Confined to That Portion of the Net Income of a Foreign Corporation Fairly Apportioned to Those Business Activities Localized Within the Taxing State Which Give Rise to That Portion of the Foreign Corporation's Net Income, Which Neither Burdens Nor Discriminates Against Interstate Commerce, Is Not Directly Imposed Upon the Privilege of Engaging in Interstate Commerce and Is Not a Condition Precedent to the Foreign Corporation's Engaging in Interstate Commerce Within the Taxing State, Does Not Contravene the Commerce Clause, U. S. Const. Article I, Sec. 8, cl. 3.

The court below, in sustaining the tax here in question, stated:

> "Tax enactments violate the commerce clause when they either profess to regulate interstate commerce, or affect it so directly as to amount to a regulation, or discriminate against it so as to place it at a disadvantage with intrasate commerce. In the present case we have a net income tax, limited and apportioned to the income earned from and within the state, which neither burdens nor discriminates against the free flow of interstate commerce. It is purely a general income tax which is not used as a measure or as a substitute for any other tax. It cannot by dictionary definition, legislative in-

tent, or by operative effect be construed or classified as an excise, franchise, or privilege tax. It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes.* In this respect, it involves no regulation of, or burden upon, interstate commerce." (R. 231, f. 232)

The state court has construed the statute in question as a general net income tax the subject and measure of which is that portion of the net income of the foreign corporation which is fairly attributable to the activities carried on within the taxing State of Minnesota. It is not a measure or substitute for any other tax and is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. It is not a franchise tax. Failure to pay the tax does not work a forfeiture of any right to continue to engage or continue to engage in interstate commerce and it is collectible only by resort to the ordinary means of collecting taxes.

The Minnesota Supreme Court's interpretation of the statute here in question is a part of the statute for the purpose of determining whether there has been a violation of the Federal Constitution. *Wheeling Steel Corporation v. Glander*, 337 U. S. 562, 69 S. Ct. 1291 (1949); *Memphis Natural Gas Co. v. Stone*, 335 U. S. 80, 68 S. Ct. 1475 (1948).

The decision of the court below is in accord with and is sustained by the decisions of this court. The decisions of this court demonstrate that there are various grounds upon which a tax may conflict with the commerce clause. Thus, any tax which is directly imposed upon the privilege of en-

gaging in interstate commerce will not stand before a constitutional attack upon commerce clause grounds. *Spector Motor Service v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); *Cheney Bros. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918). These cases hold that the states do not have the power to impose a tax directly upon the privelege of engaging in interstate commerce.

Even though a tax directly imposed on interstate commerce is forbidden a tax may be levied on net income wholly derived from operations in interstate commerce. *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378 (1946); *Memphis Natural Gas Co. v. Beeler*, 315 U. S. 649, 62 S. Ct. 857 (1942); *Shaffer v. Carter*, 252 U. S. 37, 40 S. Ct. 221 (1920); *Underwood Typewriter Co. v. Chamberlain*, 254 U. S. 113, 41 S. Ct. 45 (1920); *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918).

This court, in *Peck and Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918), pointed out that net income was not a new *subject* of tax and held that the tax, the subject of which was the net income of a corporation engaged in exportation, was not a tax upon the exportation of articles in violation of U. S. Const. Art. I, sec. 9, cl. 5. This court then stated:

> "The tax in question is unlike any of those heretofore condemned. It is not laid on articles in course of exportation or on anything which inherently or by the usages of commerce is embraced in exportation or any of its processes. On the contrary, it is an income tax laid generally on net incomes. And while it cannot be applied to any income which Congress has no power to tax (see Stanton v. Baltic Mining Co., supra, 240 U.S. p. 113, 36 S. Ct. 278, 60 L. Ed. 546), it is both nominally and actually a general tax. It is not laid on income from

exportation because of its source, or in a discriminative way, but just as it is laid on other income. The words of the act are 'net income arising or accruing from all sources.' There is no discrimination. At most, exportation is affected only indirectly and remotely. The tax is levied after exportation is completed, after all expenses are paid and losses adjusted, and after the recipient of the income is free to use it as he chooses. Thus what is taxed—the net income—is as far removed from exportation as are articles intended for export before the exportation begins. If articles manufactured and intended for export are subject to taxation under general laws up to the time they are put in course of exportation, as we have seen they are, the conclusion is unavoidable that the net income from the venture when completed, that is to say, after the exportation and sale are fully consummated, is likewise subject to taxation under general laws. In that respect the status of the income is not different from that of the exported articles prior to the exportation.

"For these reasons we hold that the objection urged against the tax is not well grounded." (247 U.S. 165, 174)

In *United States Glue Co. v. Town of Oak Creek*, 247 U. S. 321, 38 S. Ct. 499 (1918), this court again pointed out the distinction between direct and indirect burden and stated at 247 U. S. 321, 328:

"The difference in effect between a tax measured by gross receipts and one measured by net income, recognized by our decisions, is manifest and substantial, and it affords a convenient and workable basis of distinction between a direct and immediate burden upon the business affected and a charge that is only indirect and incidental. A tax upon gross receipts affects each transaction in proportion to its magnitude and irrespective of

whether it is profitable or otherwise. Conceivably it may be sufficient to make the difference between profit and loss, or to so diminish the profit as to impede or discourage the conduct of the commerce. A tax upon the net profits has not the same deterrent effect, since it does not arise at all unless a gain is shown over and above expenses and losses, and the tax canot be heavy unless the profits are large. Such a tax, when imposed upon net incomes from whatever source arising, is but a method of distributing the cost of government, like a tax upon property, or upon franchises treated as property; and if there be no discrimination against interstate commerce, either in the admeasurement of the tax or in the means adopted for enforcing it, it constitutes one of the ordinary and general burdens of government, from which persons and corporations otherwise subject to the jurisdiction of the states are not exempted by the federal Constitution because they happen to be engaged in commerce among the states."

More recently, in a case on all fours with the case at bar, *West Publishing Co. v. McColgan*, 27 Cal. 2d 705, 166 P. 2d 861, aff'd per curiam 328 U.S. 823, 66 S. Ct. 1378 (1946), it was ably stated by Mr. Justice Traynor of the California Supreme Court.

"In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce,

does not conflict with the commerce clause. (United States Glue Co. v. Town of Oak Creek, 247 U. S. 321, 326, 329; Shaffer v. Carter, 252 U. S. 37, 57; Underwood Typewriter Co. v. Chamberlain, 254 U. S. 113, 119-120; Bass, Ratcliffe & Gretton Ltd. v. State Tax Comm., 266 U. S. 271; Atlantic Coast Line R. Co. v. Doughton, 262 U. S. 413, 416; Butler Bros. v. McColgan, 315 U. S. 501.) A state 'may tax net income from operations in interstate commerce, although a tax on the commerce is forbidden, U. S. Glue Co. v. Oak Creek, 247 U. S. 321; Shaffer v. Carter, supra. Congress may levy a tax on net income derived from the business of exporting merchandise in foreign commerce, although a tax upon articles exported is prohibited by constitutional provision * * * Peck & Co. v. Lowe, 247 U. S. 165; Barclay & Co. v. Edwards, 267 U. S. 442, 447.' (New York ex rel Cohn & Graves, 300 U. S. 308, 313-314.) 'But it was not the purpose of the commerce clause to relieve those engaged in interstate commerce of their just share of state tax burdens, merely because an incidental or consequential effect of the tax is an increase in the cost of doing business * * * A tax may be levied on net income wholly derived from interstate commerce.' (McGoldrick v. Berwind—White Coal Mining Co., 309 U. S. 33, 46). State power to impose a tax on net income wholly derived from interstate commerce was recently reaffirmed in Memphis Natural Gas Co. v. Beeler, 315 U. S. 649, 656; see also International Harvester Co. v. Wisconsin, 322 U. S. 435, 442.) Such power is so well recognized that appeals questioning it are dismissed by the United States Supreme Court for want of a substantial federal question. (Memphis Natural Gas Co. v. State Tax Comm., —— U. S. ——, 65 S. Ct. 440, same case 19 So. 2d. 477; Parke Davis & Co. v. Cook, —— U. S. ——, 65 S. Ct. 436, same case 31 S. E. 2d. 728).

"The use of income as the measure rather than the subject of the tax in the Bank and Corporation Fran-

chise Tax Act is in conformity with a method of taxing national banks authorized by Section 5219 of the United States Revised Statutes that permits the inclusion of income in the measure of the tax that could not be made the subject of the tax." (Pacific Co. Ltd. v. Johnson, 212 Cal. 148, 285 U. S. 480; Educational Films Corp. v. Ward, 282 U. S. 379; Flint v. Stone Tracy Co., 220 U. S. 107.) The use of income as the subject of the tax in the Corporation Income Tax Act is in conformity with the decisions of the United States Supreme Court, cited above, that a state may tax net income from interstate commerce even though it cannot tax the privilege of engaging in interstate commerce. Before the enactment of the Corporation Income Tax Act, foreign corporations engaged in interstate business within the state without being subject to a tax burden comparable to the franchise tax imposed on domestic corporations and other foreign corporations competing in the same market. The Corporation Income Tax Act removed that discrimination." (27 Cal 2d 705, 708-710)

In the present case the court below points out that the tax is a general net income tax limited and apportioned to the income earned from and within the state which neither burdens nor discriminates against the free flow of interstate commerce and is not used as a measure or substitute for any other tax and cannot by dictionary definition, legistative intent or operative effect be construed or classified as an excise, franchise or privilege tax (R. 231, f. 232). The court goes on to point out that the tax does not involve a regulation of interstate commerce when it stated:

"It is not a tax imposed as a condition precedent to the exercise of the privilege of engaging in interstate commerce. *Failure to pay the tax does not work a forfeiture*

of any right to continue to engage in interstate commerce. It is collectible only by resort to the ordinary means of collecting taxes." (R. 231, ff. 232, 233)

The court below then went on to point out that the tax here involved placed no burden on interstate commerce, stating:

"Clearly, a net income tax places no burden upon interstate commerce. *The tax is levied after the interstate transactions localized within the state have been completed, and after all expenses have been paid and losses adjusted, and after the taxpayer, as the recipient of the remaining net income, is free to use it as he chooses. Thus the tax is exacted only after the stream of income-producing interstate commerce has ceased to flow.*" (R. 235, ff. 237, 238)

Even though a tax does not impose a direct burden upon interstate commerce, the tax must not in practical operation or effect discriminate against interstate commerce. *Memphis Steam Laundry, Inc. v. Stone*, 342 U. S. 389, 72 S. Ct. 424 (1952); *Nippert v. City of Richmond*, 327 U. S. 416, 66 S. Ct. 586 (1946); *Robbins v. Shelby County Taxing District*, 120 U. S. 489, 7 S. Ct. 592 (1887).

However, the tax is discriminatory only when interstate commerce is subjected to a tax burden greater than local business; if the tax imposed places no greater burden on interstate commerce than it does on local business, then there is no discrimination against interstate business. *Capital Greyhound Lines v. Brice*, 339 U. S. 542, 70 S. Ct. 806 (1950); *Henneford v. Silas Mason Co.*, 300 U. S. 577, 57 S. Ct. 524 (1937).

The court below, in discussing the application of the tax in question, stated:

> *"It applies equally to all taxpayers, resident or non-resident, and whether they are engaged in either interstate or intrastate commerce. Significantly Minnesota, in dealing with resident and domestic taxpayers located within its borders and doing business partly within and partly without this state, imposes the tax only on that portion of income allocable to earnings produced within this state.* As applied to non-resident taxpayers engaged in interstate commerce, it is confined to that portion of their income earned from business activities which are fairly apportioned to, and localized within the state. It is not an arbitrary imposition since the taxpayer has the opportunity of voluntarily preparing and filing his own tax return according to the information which he himself possesses. If any error is thought to occur in the levy, measure, or the amount of the tax as based on his own return, or upon a return prepared for him by the tax commissioner, he may, like any resident taxpayer, petition the State Board of Tax Appeals for relief and after that he has a further right of appeal to this court." (R. 233, f. 234)

In the case at bar the tax does not discriminate against interstate commerce in favor of intrastate business nor does it discriminate against a foreign corporation in favor of domestic corporations. And nothing in the record suggests that there has been any discrimination against the appellant in favor of local or intrastate business or in favor of domestic corporations.

Where the tax does not, in form or in substance, impose a direct burden upon interstate commerce and is not discriminatory against interstate commerce, it still must meet the possible objection that it imposes a cumulative or multiple tax burden. *Michigan-Wisconsin Pipe Line Co. v. Calvert,*

317 U. S. 157, 74 S. Ct. 396 (1954); *Gwin, White & Prince v. Henneford*, 305 U. S. 434, 59 S. Ct. 325 (1939); *Adams Mfg. Co. v. Storen*, 304 U. S. 307, 58 S. Ct. 913 (1938); *Western Livestock v. Bureau of Revenue*, 303 U. S. 250, 58 S. Ct. 546 (1938). But a tax does not impose a multiple burden if it is apportioned to the commerce carried on within the taxing state. *Western Livestock v. Bureau of Revenue*, supra.

Appellant contends that the tax in question could impose a multiple burden on interstate commerce and should, for that reason, be stricken as invalid and void under the commerce clause. The fallacy of the argument lies in the fact that the commerce clause requires a fair apportionment of the net income to the activities conducted within the taxing state. This constitutional requirement which is imposed upon each taxing state prevents the doubling up or multiplying of the burden in such a way as to result in a total taxation of more than 100% of the net income of the corporation.

With respect to the possibility of imposition of a net income tax in the state of domicile, we have the very concise statement of the court below:

> "We have, however, the suggestion, although there is no support for it in the record, that Iowa, as the domiciliary state, may attempt to impose a tax upon taxpayer's entire net income wherever earned. Most states, including Minnesota, however, permit their domiciliaries to apportion the net income derived from sources within the state and thereby excuse payment of a tax on net income derived from out-of-state sources.[1] Where, however, a domiciliary state does not voluntarily permit the apportionment of the total net income of the taxpayer, the United States Supreme Court has, by its

[1] Altman & Keesling, Allocation of Income in State Taxation, p. 31; M.S.A. 290.19.

treatment of a potential double tax burden in another situation, indicated that it may require the domiciliary state to permit apportionment. In the analogous situation the court, in dealing with an ad valorem tax, has held that a state other than the corporate domicile may impose a tax on the taxpayer's instrumentalities utilized in interstate commerce. Where, however, a tax is imposed by two or more states on an apportionment basis, the court declared that the *domiciliary* state is precluded from taxing all of taxpayer's property.[2] If the domiciliary state is required to apportion in the case of an ad valorem tax, there is no reason why it may not be required to do so with respect to a tax imposed upon taxpayer's net income." (R. 234, f. 236; R. 235, f. 236)

The rule that personal property used in interstate commerce may be taxed in two or more states on an apportionment basis precludes taxation by the domiciliary state on other than an apportionment basis. *Standard Oil Co. v. Peck*, 342 U. S. 382, 72 S. Ct. 309 (1952); *Braniff Airways v. Nebraska Board*, 347 U. S. 590, 74 S. Ct. 757 (1954). The same requirement of apportionment of the tax base, whether imposed by a domiciliary or a non-domiciliary state, should apply with respect to net income taxes and will prevent any multiple or cumulative burden upon the interstate commerce of the foreign corporation.

Appellant, in its brief, (p. 29), to illustrate discrimination and multiple burden, cites an example of a corporation, identical in operation to the appellant, except that its plant and main office is in Minnesota, and its sales and promotion activities in other states.

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[2]Standard Oil Co. v. Peck, 342 U. S. 382, 72 S. Ct. 309, 96 L. Ed. 427; Braniff Airways v. Nebraska Board, 347 U. S. 590, 74 S. Ct. 757, 98 L. Ed. 967.

By appellant's assumed allocation, which is contrary to the Minnesota law and regulations, and the evidence introduced in this case, it arrives at a percentage of income assignable to Minnesota of 99.424%.

Appellant's error in its hypothetical lies in assigning 100% of the sales to Minnesota. The only authority cited is vague references to section 290.19 and the regulations thereunder and *State v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N. W. 2d. 664 (1956).

The Minnesota law, section 290.19, subdivision 1 (4) (set forth in appendix B) is very clear as to what is considered Minnesota sales. It provides:

> "For the purposes of this section, in determining the amount of sales made within Minnesota, there shall be excluded therefrom sales negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer or by his agents or agencies outside the state and sales otherwise determined by the Commissioner to be attributable to the business conducted on such premises."

The Income Tax Director of the State of Minnesota, Wm. G. Burkman, testified (R. 40, f. 1) that sales are allocated to the state in which the office of origin of the sale is located.

There is nothing in the case of *State v. Theo. Hamm Brewing Co.*, 247 Minn. 486, 78 N. W. 2d 664 (1956), cited by the appellant as authority for its conclusion on assignability of sales, relating to that subject. The issues in that case involve the amount of the Federal income tax deduction, and whether any portion of the taxpayer's dividend received credit may be disallowed.

Consistent with the law and the testimony, the formula used in allocating income to Minnesota of a Minnesota cor-

poration with its plant in Minnesota and activities in Iowa comparable to the appellant's would be:

(a) *Tangible property in Minnesota*
Total tangible property =.....%

(b) *Payroll in Minnesota*
Total payroll =.....%

(c) *Sales originating from Minnesota offices (assignable to Minnesota)*
Total sales =.....%

(d) Total .....

(e) Arithmetic average of (a) (b) and (c) (d÷3) .....%

Applying this to the assumed facts would result in a much smaller portion of the total net income assignable to Minnesota than the appellant asserts, and when added to the portions attributable to other states having fair apportionment formulae would result in taxing no more than 100% of the appellant's income.

The appellant's charge of discrimination and undue burden based on the general application of the three-factor formula is, therefore, not well founded.

With reference to the instant case, the appellant did not contend at the trial that any non-Minnesota sales were included in the Minnesota sales factor. Since no evidence was introduced, the Commissioner's determination, which was based on the best evidence available to him, is by statute prima facie correct (Minnesota Statutes, section 290.48, subd. 8).

We have demonstrated that the tax in question does not impose a direct burden upon interstate commerce since it is imposed only upon the net income of the appellant and is limited and confined to that portion of the net income fairly

attributable to the activities conducted within the State of Minnesota. Thus, the tax is imposed upon net income which, as indicated in *Peck and Co. v. Lowe*, 247 U. S. 165, 38 S. Ct. 432 (1918), is as much outside the flow of commerce as property or goods which have come to rest within the taxing state. The tax in question does not discriminate against interstate commerce in favor of intrastate commerce nor against foreign corporations in favor of domestic corporations and it does not impose a multiple or cumulative tax burden. Nothing in the record suggests that appellant is, at the present time, being taxed on more than 100% of its net income by any combination of states. If any additional states should seek to impose a net income tax upon the appellant, their taxing acts would be subject to the scrutiny of this court and would be held to the requirement that the tax must not impose a direct burden, must not discriminate, and must not tax more than their fair share of the net income of the appellant. The tax here in question does not, in form or in substance, violate the U. S. Const., Art. I, sec. 8, cl. 3.

The issues in the case at bar have already been decided by this court in *West Publishing Co. v. McColgan*, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946). The West case is on all fours with the case at bar. The points of identity and similarity are obvious. In both the case at bar and in the West Publishing Co. case the subject and the measure of the tax is the net income of a foreign corporation engaged solely in interstate commerce. The tax is limited and confined to that portion of the foreign corporation's net income fairly attributable to the taxing state and the activities carried on therein. Both corporations had an office or offices in the taxing state. Both corporations had resident employees with-

in the taxing state devoting their entire time to soliciting orders and performing other services which were an integral part of the interstate business of the employing corporation. While the West Publishing Co. employees were entitled to receive payments and adjust complaints and collect delinquent accounts and the appellant in the instant case did not premit or authorize the Minnesota salesmen to receive payments, collect accounts or adjust complaints, the appellant's employees in the case at bar performed other services equally as important to the conduct of the interstate business. In the case at bar, the appellant's salesman acted as a conduit through which complaints could be made and induced local users of appellant's product to purchase the product from appellant's usual outlets or dealers in the state. Both states provided a market in which the foreign corporations operated in competition with local business and the agents of both corporations received the same protection and other benefits from the state as agents carrying on business activities for principals engaged in intrastate business. The state in each case protected the plaintiff's business and transactions within its borders and maintained courts in which the foreign corporations could enforce payment for the sale of its product.

A comparison of West Publishing with *Spector Motor Sevice v. O'Connor*, 340 U. S. 602, 71 S. Ct. 508 (1951); *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, 45 S. Ct. 477 (1925); and *Cheney Bros. Co. v. Massachusetts*, 246 U. S. 147, 38 S. Ct. 295 (1918), emphasizes the distinction between imposing a tax directly upon the privilege of doing an interstate business and the imposition of a tax on the net income of a foreign corporation engaged solely in interstate commerce where the tax is limited and confined to that portion of the net income of the foreign corporation

which is fairly attributable to the activities carried on within the taxing state. As the court below pointed out, it is significant to note that the California statutory scheme of taxation is similar to that of Minnesota (R. 241, f. 242; R. 242, f. 243).

CHENEY BROS. COMPANY v. COMMONWEALTH OF MASSACHUSETTS, 246 U. S. 147, 38 S. Ct. 295 (1918), DISTINGUISHED.

A Massachusetts excise tax was imposed on each of seven foreign corporations on the ground that each was doing a local business within the state. This court struck down the tax with respect to Cheney Bros. and sustained the tax with respect to the other six corporations. Cheney Bros. maintained a selling office in Boston with one office salesman and four other salesmen who travelled throughout the New England states, in the solicitation and taking of orders subject to approval by the Connecticut home office. The goods ordered were shipped directly to the purchasers. No stock of goods was kept in the Boston office other than samples used in soliciting and taking orders. Copies and records of orders were retained in the Boston office but no bookkeeping was done there and the salesman and the office rent were paid directly from Connecticut. This court struck down the Massachusetts tax on Cheney Bros. Co. stating that it was an excise tax on the privilege of engaging in interstate business and repugant to the commerce clause.

In the case at bar, the tax is not an excise tax for the privilege of engaging in interstate commerce, but is purely a general net income tax. It is interesting to note, however, that with respect to the Northwestern Consolidated Milling Company, one of the seven corporations involved in the Che-

ney Bros. case upon which the tax in question had been imposed, this court, noting that the corporation was engaged in local activity by its practice of soliciting orders for their wholesalers (thereby increasing its own sales to the wholesaler) held that this activity was sufficient to sustain even an excise tax against commerce clause objections.

In the case at bar, the court below emphasized the similarity of appellant's operations to the operations of Northwestern Consolidated Milling Company in the Cheney Bros. case when it stated:

> "In Cheney Brothers Co. v. Massachusetts, 246 U. S. 147, 38 S. Ct. 295, 62 L. Ed. 632 (cited in the Alpha case), involving consideration of the validity of an excise tax imposed upon seven foreign corporations, each differently situated, we have a good illustration of the principle that a state may impose a valid tax if the proper constitutional channel is selected. One of the foreign corporations involved therein was the Northwestern Consolidated Milling Company, which, like the instant taxpayer, had localized its business within the state." (R. 239, f. 240)

ALPHA PORTLAND CEMENT COMPANY V. MASSACHUSETTS, 268 U. S. 203, 45 S. Ct. 477 (1925), DISTINGUISHED.

In the Alpha case it was conceded that the taxpayer was engaged exclusively in interstate commerece.

The tax imposed in the Alpha case was again an excise tax—a tax on the privilege of engaging in interstate business. The activities of the corporation within Massachusetts were substantially the same as the activities of Cheney Bros. in Cheney Bros. Co. v. Massachusetts. The Alpha case is an application of the direct-indirect burden rule and does nothing more than emphasize the Cheney case and points out

that a state has no power to impose a tax directly on the privilege of engaging in interstate commerce. This court pointed out that the right to lay taxes on tangible property or on income was not involved. 268 U. S. 203, 216.

In the case at bar, the tax is not imposed upon the privilege of engaging in interstate commerce. The tax thus is not a direct burden on that commerce. The tax in the case at bar is a net income tax and as is specifically stated by this court the Alpha case does not involve the right to lay taxes on the income of a foreign corporation carrying on local activities within the taxing state.

SPECTOR MOTOR SERVICE V. O'CONNOR, 340 U. S. 602, 71 S. Ct. 508 (1951), DISTINGUISHED.

In the Spector case, the tax in question was actually imposed upon the "franchise for the privilege of carrying on or doing business within the state". The Connecticut Supreme Court defined the tax in question as a tax or an excise upon the franchise of corporations for the privilege of carrying on or doing business in the state, whether they be domestic or foreign, 340 U. S. 602, 606, and this was held by this court to be a tax placed unequivocally upon the corporation's franchise for the privilege of carrying on exclusively interstate transportation in the state. 340 U. S. 602, 608.

This court indicated that the tax was stricken simply for the reason that it was imposed directly upon the privilege of engaging in interstate commerce and said:

> "Even though the financial burden on interstate commerce might be the same, the question whether a state may validly make interstate commerce pay its way depends first of all upon the constitutional channel through which it attempts to do so." 340 U. S. 602, 608.

and went on to state at 340 U. S. 601, 608, 609:

> "The answer in the instant case has been made clear by the courts of Connecticut. It is not a matter of labels. The incidence of the tax provides the answer. The courts of Connecticut have held that the tax before us attaches solely to the franchise of petitioner to do interstate business. The state is not precluded from imposing taxes upon other activities or aspects of this business which, unlike the privilege of doing interstate business, are subject to the sovereign power of the state. Those taxes may be imposed although their payment may come out of the funds derived from petitioner's interstate business, provided the taxes are so imposed that their burden will be reasonably related to the powers of the state and non-discriminatory."

The tax in Spector Motor Service decision was not stricken because the corporation was engaged *solely* in interstate commerce. The tax was invalid for the reason that a tax; even though it be fairly apportioned and non-discriminatory and measured by net income, may not be directly imposed on the privilege of engaging in interstate commerce.

West Publishing Co v. McColgan, 328 U. S. 823, 66 S. Ct. 1378, affirming per curiam 27 Cal. 2d 705, 166 P. 2d 861 (1946), points out the distinction between a tax imposed upon net income and a tax imposed on the privilege of engaging in interstate commerce.

In the West Publishing Co. case, this court affirmed per curiam the decision of the California Supreme Court with respect to the California tax imposed upon the apportioned net income of a foreign corporation engaged solely in interstate commerce.

With respect to the direct burden question the California Supreme Court at 27 Cal. 2d 705, 708-710, stated:

"In relying on the foregoing cases for the proposition that a foreign corporation engaged within a state solely in interstate commerce is immune from net income taxation by that state, plaintiff overlooks the distinction made by the United States Supreme Court between a tax whose subject is the privilege of engaging in interstate commerce and a tax whose subject is the net income from such commerce. It is settled by decisions of the United States Supreme Court that a tax on net income from interstate commerce, as distinguished from a tax on the privilege of engaging in interstate commerce, does not conflict with the commerce clause. (citing cases) A state 'may tax net income from operations in interstate commerce, although a tax from the commerce is forbidden, U. S. Glue Co. v. Oak Creek, 247 U. S. 321, Shaffer v. Carter, 252 U. S. 37, 40 S. Ct. 221, 64 L. Ed. 445. * * *"

Respondent agrees with appellant's statement: "Certainly those engaged in interstate commerce must bear their just share of state taxes—or, as one former member of this court put it, 'even interstate commerce must pay its way.'" (Brief of Appellant, p. 34)

In the case at bar, we have demonstrated that the tax here involved does not impose a direct burden upon interstate commerce—that the tax here in question has no deterrent effect upon interstate commerce for the tax is levied after the interstate commerce transactions have been completed, after the expenses have been paid and losses adjusted, and after the taxpayer, as the recipient of the remaining income, is free to use it as he chooses. Thus, the tax is imposed only after the stream of income-producing interstate commerce has ceased to flow. It has been demonstrated that the tax is non-discriminatory and does not and cannot impose any multiple burden upon the foreign corporation engaged in

interstate commerce. The theme of the tax in question is fairness and the State of Minnesota seeks only to have appellant assume a share of the cost of government commensurate with the protections and benefits it receives.

CONCLUSION

It is respectfully submitted that the decision of the Supreme Court of Minnesota be affirmed.

MILES LORD
Attorney General
PERRY VOLDNESS
Assistant Attorney General
ARTHUR C. ROEMER
Special Assistant
Attorney General
102 State Capitol
St. Paul 1, Minnesota
Attorneys for Respondent

APPENDIX "A"

The original enactment in 1933 of the statute which is now coded as Minnesota Statutes, section 290.03, provided:

"RATE OF TAX. (a) There is hereby imposed an annual tax for each taxable year upon the taxable net income for such year of every taxpayer specified in sub-section (b) hereof, computed in the manner and at the rates hereinafter provided.

"(b) The tax imposed by sub-section (a) shall apply in the case of a domestic and foreign corporation whose business within this state during any taxable year consists exclusively of interstate commerce; to resident and non-resident individuals; to the estates of decedents dying domiciled within or without this state; to trusts (except so far as these are taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations; provided that no non-resident individual shall be taxed on his income from compensation for labor or personal service within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year."

Laws Minnesota 1933, Ch. 405, Article II, section 3, p. 690.

In 1937, the statute was amended to read:

"Sec. 3. RATE OF TAX. That Laws 1933, Chapter 405, Section 3, be and the same is hereby amended so as to read as follows:

"Sec. 3. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations whose business within this state during the taxable year consists

exclusively of foreign commerce, interstate commerce, or both;

"(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

"(c) Estates of decedents dying domiciled within or without this state; and

"(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1937, Extra Session, Ch. 49, section 3, page 61.

In 1941, the statute was amended to read:

"Section 1. LAW AMENDED. Mason's Supplement 1940, Section 2394-3, is hereby amended to read as follows:

"2394-3. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(a) Domestic and foreign corporations not taxable under Section 2 who own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both.

"(b) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year.

"(c) Estates of decedents, dying domiciled within or without this state, and

"(d) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1941, Ch. 550, section 1, p. 1153.

In 1945, the statute was amended to read:

"Section 1. Minnesota Statutes 1941, Section 290.03, is hereby amended to read as follows:

"290.03. CLASSES OF TAXPAYERS. An annual tax for each taxable year, computed in the manner and at the rates hereinafter provided, is hereby imposed upon the taxable net income for such year of the following classes of taxpayers:

"(1) Domestic and foreign corporations not taxable under section 290.02 which own property within this state or whose business within this state during the taxable year consists exclusively of foreign commerce, interstate commerce, or both;

"Business within the state shall not be deemed to include transportation in interstate or foreign commerce, or both, by means of ships navigating within or through waters which are made international for navigation purposes by any treaty or agreement to which the United States is a party;

"(2) Resident and non-resident individuals, except that no non-resident individual shall be taxed on his income from compensation for labor or personal services within this state during any taxable year unless he shall have been engaged in work within this state for more than 150 working days during such taxable year;

"(3) Estates of decedents, dying domiciled within or without this state; and,

"(4) Trusts (except those taxable as corporations) however created by residents or non-residents or by domestic or foreign corporations."

Laws Minnesota 1945, Ch. 410, section 1, p. 787.

APPENDIX "B"

290.19. Net income to be allocated. Subdivision 1. Computation when business conducted partly within state; apportionment. The taxable net income from a trade or business carried on partly within and partly without this state shall be computed by deducting from the gross income of such business, wherever derived, deduction of the kind permitted by section 290.09 so far as connected with or allocable against the production or receipt of such income. The remaining net income shall be apportioned to Minnesota as follows:

(1) If the business consists of the manufacture in Minnesota or within and without Minnesota of personal property and the sale of said property within and without the state, the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(a) The percentage which the sales made within this state and through, from or by offices, agencies, branches or stores within this state is of the total sales wherever made;

(b) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and,

(c) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(d) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentages: 70 per cent of the percentage determined under clause (1) (a), 15 per cent of the percentage determined under clause (1) (b), and 15 per cent of the percentage determined under clause (1) (c);

(2) (a) In all other cases the remainder shall be apportioned to Minnesota on the basis of the percentage obtained by taking the arithmetical average of the following three percentages:

(1) The percentage which the sales, gross earnings, or receipts from business operations, in whole or in part within this state bear to the total sales, gross earnings, or receipts from business operations whenever conducted;

(2) The percentage which the total tangible property, real, personal, and mixed, owned or used by the taxpayer in this state in connection with such trade or business is of the total tangible property, real, personal, or mixed, wherever located, owned, or used by the taxpayer in connection with such trade or business; and

(3) The percentage which the taxpayer's total pay-rolls paid or incurred in this state or paid in respect to labor performed in this state in connection with such trade or business is of the taxpayer's total pay-rolls paid or incurred in connection with such entire trade or business;

(4) The percentage of such remainder to be assigned to this state shall not be in excess of the sum of the following percentage: 70 per cent of the percentage determined under clause (2) (a), 15 per cent of the percentage determined under clause (2) (b), and 15 per cent of the percentage determined under clause (2) (c);

(b) If the methods prescribed under clause 2 (a) will not properly reflect taxable net income assignable to the state, there may be used, if practicable and if such use will properly and fairly reflect such income, the percentage which the sales, gross earnings, or receipts from business operations, in whole or in part, within this state bear to the total sales, gross earnings, or receipts from business operations wherever conducted; or the separate or segregated accounting method;

(3) The sales, pay-rolls, earnings, and receipts referred to in this section shall be those for the taxable year in respect of which the tax is being computed. The property referred to in this section shall be the average of the property owned or used by the taxpayer during the taxable year in respect of which the tax is being computed;

(4) For the purposes of this section, in determining the amount of sales made within Minnesota, there shall be excluded therefrom sales negotiated or effected in behalf of the taxpayer by agents or agencies chiefly situated at, connected with, or sent out from premises for the transaction of business owned or rented by the taxpayer or by his agents or agencies outside the state and sales otherwise determined by the commissioner to be attributable to the business conducted on such premises. If the commissioner finds that the taxpayer maintains an office, warehouse or other places of business outside the state for the purpose of reducing its tax under this section it shall in determining the amount of taxable net income include therein the proceeds of sales attributed by the taxpayer to the business conducted at such place outside the state.

Subd. 2. Application of methods. The methods prescribed by subdivision 1 shall apply wherever and in so far as the

business carried on within this state is an integral part of a business carried on both within and without this state.

Subd. 3. Application of sections 290.17 and 290.18. Nothing in this section shall prevent the application of sections 290.17 and 290.18 to that portion of a taxpayer's income which is not from a trade or business carried on partly within and partly without this state.

[Sec. 290.19 R. 5]